

Scenarios Testing Academic Freedom

William Menke, May 6, 2012

Jonathan Cole, the former Provost of Columbia University, sent around a survey¹ that contains fourteen scenarios that depict ethical dilemmas faced by professors or the university administration that supervises them. Many of the scenarios are thought provoking; I summarize my take on them, below.

As you will see, most are archetypically academic in that they test the limits of *academic freedom*, the principle that professors can hold, express and publish opinions on any subject, even a controversial one, without fear of retaliation from colleagues or the university administration. In this sense, it is similar, though perhaps somewhat more expansive, than the right of *free speech* that is granted by the US Constitution.

Voltaire, the eighteenth century philosopher, epitomized free speech when he declared, “I detest what you say, but I will defend to the death your right to say it²”. My experience is that we academics have such an easy time with free speech because we detest so little. Unusually well-versed with the spectrum of world opinion, we are seldom threatened by new ideas, since few are new to us. On the other hand, when we do detest an idea, we are no more likely than the average human being to fight to protect the speaker’s right to express it.

When teaching in a classroom, professors face a special challenge in balancing free expression of ideas against good pedagogic technique. On the one hand, college is about expanding the mind; that is, encountering unconventional points of view that lead to intellectual growth. Toward this end, a professor can rightfully challenge students with opinions that are controversial or even offensive. On the other hand, the presentation needs to engage the class to be effective. A professor, who merely offends the sensibilities of students, without connecting with them and earning their respect, is likely to accomplish little. Several of the scenarios explore this balance.

Scenario 1 postulates that a member of Congress questions the validity of the research conducted by a professor receiving Federal funding and demands that the university require that the professor stop the work immediately. Analysis: This is

not an academic freedom issue. Official actions of Congress are made by its members acting in a group according to that body's rules. No member, acting unilaterally, has any more authority to demand an action than does an ordinary citizen. In particular, no member can overrule a properly executed grant or contract between a Federal agency and a university. Contract law, and not the principle of academic freedom, is at stake here. Action: The university should ignore the demand.

Scenario 2 asks whether a professor commits racially-motivated harassment, by telling an African American student, during class and in a dismissive and disdainful voice, that the student is a product of Affirmative Action and, consequently, doesn't belong in college. Analysis: The professor's obligation to fairly assess a student according to academic performance takes precedence over free expression. There is no constructive criticism in this scenario, only ridicule based on racial stereotyping. Furthermore, aspects of the student's confidential academic record (e.g. university admission), or at least the professor's guesswork about them, are discussed publicly – another violation of university policy³. Action: The professor should be disciplined.

Scenario 3 asks whether the university administration should discipline a professor who privately views sexually explicit material on his office computer. Analysis. Except for child pornography, most sexually-explicit videos can be legally viewed in the US. In 2008, the Maryland State Assembly attempted to require its State University to develop a policy restricting porn on campus. However, their action was in response to students, not faculty, viewing a sexually explicit movie. Media reports of the time claimed that this would be the first such policy at a public university. The State's requirement was rebuffed by its Board of Regents, who argued that it was not in the "best interest of the University System of Maryland or the state because of the First Amendment issues such a policy would raise and because of the administrative burden and costs of implementing [it]"⁵. Indeed, my opinion is that this is an archetypal freedom of speech issue, precisely because it comes across as merely recreational and so. Detesting pornography would seem to have so little *down side*. But one has only to look back at the Lenny Bruce trials of the 1960's, which dealt with what are by today's standards trivial obscenities, to realize that the public's notion of the obscene has been pretty fluid. The trend toward permissiveness could easily reverse and grow to encompass, if

we let it, a much larger segment of our culture than *Pirates XXX* (the movie that so offended the Maryland State Legislature). As an alternative, a university could seek to ban all non-educational use of its computer networks. However, such a ban would be confounded by the blurred boundaries between a typical professor's private and university life. Some professors provide their own personal computers for their offices. Some use their own smart-phones connected to commercial, not university, networks. Some live in university housing connected to university-sponsored networks. Some are allowed or even encouraged to use their offices for non-university work, be it *pro bono* work for third parties, such as reviewing journal articles⁶, or paid consulting. Others have no office at all, and work in the library or at home. Another issue is that such a policy might be enforced through blocking (that is, censoring) internet sites or by monitoring a professor's network traffic. Either would be perceived as unacceptable restrictions of academic freedom by most professors. Action: None; the professor is violating no university policy.

Scenario 4 asks whether a professor can be disciplined for being a member of a group that denies the Holocaust. Analysis: The United States has a long tradition that a person should not be penalized on account of association with a group or organization. Exceptions, such as the McCarthy Era Communist Party witch hunts are seen by most people as an embarrassing aberration. Many universities, including Columbia, specifically protect associations under their academic freedom policies⁴. Action: None.

Scenario 5 asks whether a university's Institutional Review Board (IRB, a biomedical ethics board), can require mandatory, full and detailed disclosure of birth control options to subjects participating in an anthropologic study in Venezuela, in a case where the researchers themselves advocate a more nuanced approach tuned to the group's religious sensitivities. Analysis: The IRB is a mandatory requirement of the US Federal medical funding system created to prevent exploitation of human research subjects. A common criticism of the IRB system is that it was designed to handle medical research in US hospitals and that its rules are unsuited for other types of research, especially social science research abroad. Action: This is a good argument for social science professional societies working towards changing the rules. However, until that time, the university has no legal option but to follow the advice of its IRB. Any student of academic bureaucracies knows that a review board will issue ridiculous rulings in at least a

small percentage of cases. Get used to it! A defect of Columbia's policies is that the ruling of its IRB is not appealable.

Scenario 6 asks whether it's a shame that a brilliant but unconventional researcher fails to get an appointment or a research grant because his or her work is outside the current paradigm. Furthermore, it asks whether it's ethical for a peer to give such a researcher a poor review. Analysis: It is almost axiomatic that brilliant researchers are usually shunned or even persecuted, not only by society but by their closest colleagues. It's a failure of our scientific review system, which asks the average scientists, through the writing of peer reviews, to direct the course of the field. The average scientist does well enough in distinguishing innovative from mundane research, but is poor at recognizing true genius. Action: Yes, the hindering of genius is a shame, but it is the defect of the system, not of an individual peer reviewer. Some types of training can help peer reviewers identify when their own biases are affecting their judgment. But curing honest but poor judgment is impossible.

Scenario 7 asks whether the university administration can require that a biology professor remove a blog from her web site that discusses the "evolutionary benefits of homophobia" and which is perceived as anti-gay by some readers. Analysis: The general notion that behaviors can have a genetic or evolutionary basis is accepted in biology, so it should be no surprise that homosexuality and homophobia have been discussed in this context in the scholarly literature (but with very little settled, I might add). It is generally accepted that the principle of academic freedom forbids the administration from censoring a professor's writings in non-university forums. The issue then is whether it can restrict the posting of controversial, offensive or unpopular ideas to the professor's page on the university web site, especially in a case where it has some scholarly basis. An argument for restricting such material is that the university might be perceived as endorsing such an idea, merely through hosting a blog that expresses it. This argument is weak, because blogs are generally understood to be editorial in nature; they express only the author's thoughts of the moment. Many blogs (including my own) contain an explicit disclaimer to this effect. Universities receive considerable benefits from professor-contributed web; eliminating it altogether would be counterproductive. Furthermore, professors would undoubtedly just move their blogs to alternative sites should they be prohibited from university-sponsored sites.

Setting up a system to respond to any complaint about a blog's content would seem to be cumbersome. Action: None, except to suggest to the complainants that they express their opinions in a blog of their own.

I note as an amusing aside that, while the professor's musings on homophobia might well be offensive to some people, her implicit endorsement of *evolution* would offend at least as large a fraction of the overall US population. However, ardent creationists tend to be concentrated in sectors of society that have little contact with, or respect for, academia.

Scenario 8 posits a professor who advocates Israeli concessions to Palestinians and who condones suicide bombings, but only in non-university forums. It asks whether the university has the right to sanction him in response to student complaints. Analysis: The reference to political concessions is a red herring; the real issue concerns the suicide bombings. The case is similar to, but more extreme than, the pornography case discussed in Scenario 3, since it deals with *detestable behavior*. "Condone" is a much weaker word than "advocate" or "incite", but still indicates some level of approval of a violent, and in my opinion immoral, act. Legally, ever since the 1969 Brandenburg vs. Ohio Supreme Court ruling, even inflammatory speech (let alone mere condoning) is legal unless it is directed to inciting and likely to incite imminent lawless action. Thus, the issue is whether the private lives of professors should be held to a higher standard than mere legality. This issue seems to have received some attention. Columbia University, for instance, specifically grants their professors academic freedom, but notes that they "should bear in mind the special obligations arising from their position in the academic community"⁴ However, these obligations are not enumerated; the intent may be only to urge professors to exercise their best judgment. The scenario is reminiscent of the case of Ward Churchill, a University of Colorado professor who claimed that he was fired in retaliation for his condoning the 9/11 attacks. However, that case, still in appeal, is complicated by his having been dismissed (at least ostensibly) for research misconduct, not speech. In my opinion, professors' private lives should not be held to standards higher than required by the law⁷. We should be especially wary of holding professors (or anyone else) to standards that are unarticulated before we discover that we detest an action of theirs. Action: None.

Scenario 9 also involves violence, but in the case, the professor himself commits it, by throwing a stone at a political protest, the act of which is recorded by a photographer. The issue is whether the professor should be sanctioned when the photo is brought to the attention of the administration by a group of students. Analysis: Throwing a stone could well constitute battery (if it strikes the victim) or assault (if it misses). Both are serious crimes. However, only the local civil authorities and not the university have the authority to indict and convict. And while a photograph, properly attested to by the photographer in a legal setting, may well be damning evidence of the crime, the same photograph – however disturbing - seen in the newspaper or browsed on the web, is certainly not. It may be giving a false impression of actual events. Action. The administration should consider having University Counsel confidentially advise the professor that rock-throwing can lead to an assault indictment, but in the absence of civil charges, the university should take no action against the professor.

Scenario 10 imagines that a female student creates a controversial performance art project that includes videos of, and blood from, a self-induced herbal abortion. We are asked if the dean has the authority to exclude the art from display and whether the advisor, who approved the project, should be sanctioned. Analysis: The issue here is primarily the regulation of acts that lead up to the creation of art – the abortion – and not the art itself. If the artwork consisted of a video of a simulated procedure and if it contained only simulated blood, it would be only marginally more controversial than, say, a graphic and gory painting of the same subject. Such a painting, though still offensive to some, almost certainly would be displayed without debate. The distinction between art and act is important, because a spectator may feel that, by viewing the art, he or she participates in the circumstances of its creation. Such a feeling need not be related to the legality of the act, but only to moral conflict that it engenders. Thus, for instance, artwork created in New Jersey by videotaping the torture of mice and consisting partly of their tanned pelts violates no laws, as mice are explicitly excluded from that state's animal cruelty laws. Even so, people viewing the art may well feel that they, themselves, are complicit in the act of animal cruelty. Those feeling would be absent if they merely viewed a painting that depicted tortured animals or even if they viewed a documentary film containing scenes of animal cruelty that were not instigated by the artist. The university, in displaying art, need not find acceptable

all possible acts that might be conducted as part of its creation, and can legitimately prohibit advisors from approving art projects that involve them.

Action: Any sanctioning of the advisor would need to be in the context of policies regulating art projects, which (if they exist at all) are not mentioned in the scenario. However, as an ancillary matter, the advisor approved a project that included the student performing a medically-unsupervised abortion using non-FDA-approved substances, which was clearly in reckless disregard for the student's welfare and may well deserve sanction.

Scenario 11 posits that a white professor, during the first lecture of a course on race relations, presents a list of putative demographic differences between African Americans and whites and states that he will address the reasons for these differences in a later class. The list includes differences such as the higher imprisonment rates and lower average SAT scores of African Americans. Some African American students complain that the professor is racist and ask that the dean bar the professor from teaching the course. We are asked what the dean should do. Analysis: The students' complaint, though understandable, is premature. Action: The dean should say to the students. "Stick with the course for a while and try to give the professor an open mind. If, after a few weeks, you still think the professor is racist, come back and we'll talk about it more. And remember that you can always drop the course without penalty". And the dean should say separately to the professor, "Some of your students (who will remain anonymous) were taken aback at being left hanging about the reasons for the demographic differences. They are worried that you're going to give racist reasons (which no doubt they've all heard before). Be sure to return to the subject as soon as possible and make special effort to be really clear about what you're saying".

Scenario 12 asks whether a professor can be terminated if he is a "person of interest" in a murder case involving one of the university's students. Analysis: The "Person of interest" category is an informal term usually applied to persons who have not been formally charged with any crime, but who are involved in a criminal investigation. As the term is unofficial, it is unclear who has the authority to make such a designation or what precise implications it has. In contrast, terms like "arrested" or "indicted" are much more precise, as they refer to well-documented legal actions. For this reason, basing a termination decision on a person of interest designation is unwise. Should the university be concerned that the lives of its

students are endangered, it has the option of placing the professor on administrative leave until the matter is resolved. Action: Place the professor on administrative leave.

Scenario 13 imagines a male professor pointing out in a course that women don't score as well as men on quantitative tests like the math SAT and stating his opinion that genetic differences might contribute to the difference. Students complain to the dean that the professor is sexist. Analysis: This case differs from Scenario 2 in that the controversial material is presented as part of normal academic discussion and is not specifically levied as a criticism. It is reminiscent of the controversy involving Lawrence Summers, the Harvard University president who expressed the same opinion in a speech. One of the main criticisms of Summers was "careless scholarship"; that is, neglect of the huge literature that uses the scientific method, and not guesswork, to address the reasons for the gender gap. Indeed, although the scholarly literature explores explanations based on both "nurture" and "nature", the professor apparently mentions neither when offering his opinion. Summers case included a discussion of academic freedom, with most people arguing that Summers opinions, while misinformed, were protected under it. An additional nuance in the current case is that social science research indicates that a student will tend to underperform if told, prior to a test, that he or she belongs to a group that can be expected to do poorly on it. Certainly a professor, when challenging students with a controversial point of view, should choose a forum that will minimize such effects. Action: A call from a colleague asking whether the professor really wants to be compared to Larry should do it!

Scenario 14 asks whether it is ethical for the US Government to prevent citizens of certain foreign countries perceived as sponsoring terrorism from working in US university labs that handle pathogens such as plague. It further asks whether it is ethical for editorial boards of professional journals to have boards that self-censor; that is, rule on whether papers should be amended to omit information that could potentially be used in creating bio-weapons. Analysis: This is a case where the right to personal security trades off with other rights, such a free association and non-discrimination and where the US Government asserts that it is the arbiter or the balance. Concerning restrictions on employment, universities have no choice but to obey US law. Concerning review boards, the US Government may intervene directly if it thinks that journals are recklessly publishing information

that facilitates the construction of bio-weapons; self-policing is a reasonable preemptive response. Action: Those people who would prefer a different balance between rights are free to work towards the easing the relevant laws and policies. But this doesn't sound like a battle that those seeking drastically-eased restrictions can win in the current political environment, and especially in light of the 9/11 anthrax attack. Science has often led to innovation in weaponry, as in the *Manhattan Project*. Scientists have to live within this reality.

¹The text of the survey is at jonathanrcole.com/survey

²Well, Voltaire actually said, “Monsieur l'abbé, je déteste ce que vous écrivez, mais je donnerai ma vie pour que vous puissiez continuer à écrire” (Voltaire, letter to M. le Riche, February 6, 1770), which uses the word *write*, not *say*.

³Policy On Access To Student Records (FERPA), Columbia University, 2012.

⁴“Academic freedom implies that all officers of instruction are entitled to freedom in the classroom in discussing their subjects; that they are entitled to freedom in research and in the publication of its results; and that they may not be penalized by the University for expressions of opinion or associations in their private or civic capacity; but they should bear in mind the special obligations arising from their position in the academic community.” Statutes of the University 8.70, Columbia University, 2012.

⁵Jennifer Epstein, Porn Without Protection, Inside Higher Ed, November 12, 2009.

⁶At Columbia, my colleagues and I have been encouraged by the administration to consider all third party reviews as non-Columbia work, and so to exclude them from Federally-mandated *effort reporting*.

⁷Twice in my career I have been required to sign a loyalty oath: in 1975, as a condition for a federally-funded NSF Graduate Fellowship; and in 1986 as a condition for being hired at Columbia University. (Ironically, foreign national were excluded from the requirement to sign the latter). Personally, I didn't have any problem with swearing to uphold the US Constitution, because I saw it as a short document embodying abstract and praiseworthy ideals that we all should aspire to live by. I have more of a problem with very long documents, such as the NY State Constitution, because I'm not adequately able to anticipate what someone might accuse me of *failing* to uphold. As a kayaker, might I plausibly run afoul of “All boats navigating the canals and the owners and masters thereof, shall be subject to such laws and regulations as have been or may hereafter be enacted concerning the navigation of the canals” (Article 15, Section 3.1)?